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MICHIGAN
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THE NATURE OF LEGAL RIGHTS AND DUTIES.[1]

ONE cannot long talk on a legal topic without using the words *right* and *duty* or some synonyms. It is familiar hearsay that a purpose of law is to create, delimit, and protect rights and to define and enforce duties. Therefore it is of importance to inquire what is meant by "a right" and by "a duty" when we use these terms in legal discussion. The question is a linguistic one; but in the process of finding the proper answer, we shall have to analyze some of our common sorts of mental concepts and perhaps shall finish with a clear comprehension of the purport of parts of our legal reasoning which ordinarily we veil by convenient and familiar words from careful scrutiny and any but the vaguest apprehension. I do not purpose to express the details of such an analysis in these pages. I desire only to explain the results of my thinking which may be verified or disproved by my readers through their own mental tests.

In the article to which this is a supplementary note, I sought to clarify the interrelation of three sorts of elements in legal study—(1) the phenomena of concrete events and their governmental consequences which constitute the objective field of law, (2) perception, thinking, and knowledge concerning that field, and (3) the expression of our consciousness of these mental processes. I dwelt on the facts that both mental concepts and language are implemental in character, that legal thinking and communication may be as free as those of any science, and that they are subject to intelligent criticism only for lack of accuracy, clearness, or efficiency. Particularly I insisted that language and its definition are subordinate matters and that disputes concerning merely the proper scope of legal terms and methods of expression are wasteful of effort. By reference to

[1] This is a supplementary note to an article entitled, "What is the Law," which appeared in the last volume of the Review. See 11 Mich. L. Rev., pp. 1 and 109.

that article I wish to reiterate these points. Again I state that I am not moved to force upon any one argumentatively my definitions of common legal terms. My discussion of words is only incidental to an ulterior main purpose and therefore is incomplete. That main purpose is to explain clearly my views concerning common methods of apprehending and discussing certain sorts of facts abstracted from that external field of causal events and governmental consequences which as lawyers we seek to comprehend. I think that these methods often are used without conscious clear perception of their purport and that therefore a brief exposition of the correlation of these methods and of facts in the objective field of law may tend to make legal thinking more definite and sure.

When we intelligently assert of a thing that it is "right," we mean that according to some human judgment, individual or collective, it meets a test with relation to some end or adjustment. The judgment may be our own or that of another or others which we adopt or accept. It may or may not be made through the employment of scientific criteria or rules. When we decide that certain conduct morally is right or wrong, we approve or disapprove of it in its aspect of an actual or potential cause of consequences to individuals and to society.[2] In evolving this judgment we may give weight to considerations of pertinent customs, habits, prevailing ideas and beliefs, social utility, individual liberty, harmful or beneficial effects, the personal idiosyncrasies and physiological limitations of the persons concerned, and the extent of their pertinent knowledge, and to considerations, superstitions, or prejudices of any other sorts, or we may be impelled to our decision, wholly or partly, by analogous instinctive motives. However we reach our conclusion, the term *right* or the term *wrong* is but an asserted label which cannot be appreciated accurately except in the light of the purposes which inspired and the mental processes which produced the application. Whether a certain method is a right method in the sense of being effective to produce specified results, is a question which the evolution of events may solve; but except insofar as human judgment settles on definite criteria of morality, there is no external measure of the correctness or incorrectness of a particular assertion of moral rectitude or delinquency.[3] "Morally right" and "morally wrong"

[2] This is not always the basis of approval or disapproval. The motives of our criticism of morals often are instinctive, unreasoned impulses from accumulated beliefs, superstitions, religious ideas, or other traditions and untrained mental habits, which produce them without conscious measuring of effects or purposes.

[3] In making this statement, I risk, of course, the criticism of all who insist on the existence of an external supernatural force which promulgates or establishes in this life an absolute, unassailable moral justice, and also of all who would contend that there

remain blind labels commonly used to signify approval or condemnation of conduct but not indicating definitely anything beyond this.

It is true that some sorts of conduct would be condemned and accordingly labeled universally by respectable opinion. It is true also that there is a predominant and potent public opinion on the "morality" of a large proportion of ordinary sorts of conduct, that this public opinion may be vouched in support of an individual assertion, and that our common knowledge of it furnishes a starting plane, a check, and a balance to all discussions of moral right and wrong. These facts, however, do not militate successfully against my postulates, for, in the first place, this predominant opinion is in many important particulars uncertain, varying, or indefinite both in conclusions and criteria and, in the second place, even independently of this lack of certainty and stability it cannot be the conclusive arbiter of decision or of the proper use of the word-labels which we are discussing. Individual opinion, and particularly the leading enlightened opinion of the day, may differ legitimately from the predominant opinion of the time. Therefore the motives for particular applications of the labels may vary legitimately even beyond the range of predominant usage.

To reiterate, "morally right" indicates either approval or non-condemnation by some human opinion or judgment of the thing to which the label is attached and "morally wrong" indicates the contrary; but knowledge of the identity of the opinion or judgment and of the criteria and processes which have produced it is an important prerequisite to a full appreciation of the import of the labeling.[4] Can we fasten a more definite and stable meaning to the usual use of the phrases *legally right* and *legally wrong?*

In my main article I argued that the law consists of the flux of concrete occurrences and their legal consequences brought about through the operation of authoritative governmental law-determining machinery and that the essential field of legal study consists of such actual sequences and the potentialities of similar future sequences.[5] Bearing in mind this comprehension of the nature of the

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actually exist independently of human will and judgment moral unitary rules and principles which may be discovered and demonstrated. The conflict between such criticism and my philosophy, I can not hope to reconcile. To avoid serious misunderstanding, let me hasten to assure my readers that there is nothing even remotely atheistical in these remarks.

[4] It is true that philosophers often have attempted to give a standard certain meaning to the term right; but if their definitions are examined critically, they will be found either vague and useless or, insofar as they attain definiteness, open to criticism from large bodies of men who hold opposing views of justice and policy, especially on the eternal question of the exact bounds which should be placed on individual liberty.

[5] For clarification of this phrase, see the main article, 11 Mich. Law Rev. 9-12.

Perhaps some additional light will be given by the following quotation from a reply which I made to a criticism of my main article by Arthur W. Spencer, Editor of The Green Bag:

"Jones and Smith have had business differences. They meet on the street. Jones stops Smith and accuses him of dishonesty. Smith angrily strikes Jones. Jones grabs Smith in his arms and holds him fast to prevent further 'unpermitted physical contact' from the energetic operation of Smith's fury. Friends appear on the scene and separate the gesticulating, garrulous combatants. A truce is imposed by neutral persuasion and physical restraint. **Exeunt omnes,** Jones and Smith promising reciprocally future undesirable results.

"Thus far I have stated no legal phenomenon. No consequences brought about through the operation of governmental agencies are included among the events narrated. I presume that Mr. Spencer would say that the panorama consisted of 'social phenomena' only, and certainly I should not object to the use of the epithet. I agree that no part of 'the law' has been indicated.

"Let us proceed with the trivial history, however. Jones, in whose mind the memory of Smith's blow still rankles, appeals to Newsome, attorney and counselor at law, to verify his conviction that Smith's assault grossly violated the majesty of the law and the rights of Jones to personal security. After due inquiry and cogitation, Newsome informs Jones that he is entitled to satisfaction in damages in an action for assault and battery. Jones directs Newsome to commence such a suit. Consequently a summons is taken out and served on Smith in accordance with the proper procedure of the jurisdiction. The issuance of this summons initiates a string of governmental events consequential to the assault. The sequence now becomes a legal phenomenon, though, of course, not yet one from which the lawyer would derive much professional information. From this event on through the preliminary procedure, the trial, verdict, judgment, appeal, reversal, retrial, etc., etc., through execution of the judgment in favor of Jones and completion of the records, there continue sequences of consequential governmental occurrences which, with respect to their causes preceding them in these sequences and in other collaterally contributing sequences, and with respect to their subsequent effects, are phenomena of the sort that excite our professional interest.

"Some of the 'collaterally contributing sequences' to which I referred above may result from legislative expression which is 'interpreted' and 'applied' in the determination of the case, and generally there are some sequences whose causal contribution to the decision are precedents of one sort or another. I shall not repeat here the indications which I gave in my article of the causative effects of precedents and legislation upon subsequent cases; nor shall I repeat my summary of the different phases of the element of judicial generalization and its expression. With respect to such generalizations, however, I wish to correct a mis-perception which Mr. Spencer states in the third paragraph of his criticism. He says:

> '. . . he includes in his definition of law not only the foregoing objective material, but also past judicial generalizations concerning the phenomena. He conceives of laws as mental processes in this sense, inasmuch, it would appear, as they are merely the reflection of the concrete sequences described. Other generalizations than these actual ones of the past he excludes. It is apparent, on examination, that in treating past judicial generalizations as the law, he refers not to the generalizations themselves but to their content. He says that we may by abbreviation speak of the science of law as "the law," but that when we use "the law" in this sense we mean not the law itself, but our knowledge concerning it, and he is on his guard against what he conceives to be pitfalls of such a catachresis. Essentially, therefore, he conceives of the law as external sequences of phenomena which not only afford material for legal rules but are to be identified with such rules.'

"I certainly include past judicial generalizations and also their expression in the official opinions among the phenomena in the field of legal study. I include them as part of the 'foregoing objective material,' however, and I would also include within objective potential governmental sequences the potenial judicial generalizations and

law, how are we to explain the use of the expressions which we are considering? Are "legally right" and "legally wrong" merely labels of approval and condemnation? If they are, whose judgment do they indicate? Do they refer only to mental operations, or do they refer to observable events outside of the mind?

Perhaps to many students of law these questions will smack of metaphysics and will promise no results of practical importance. "What is the use of such inquiries?" they will say. "Everyone knows what is meant by *legally right* and *legally wrong*. Why cloud the understanding with further puzzles of analysis?" But is this true? Let anyone try to point with definiteness and comprehension to a thing corresponding to the phrase *legal right*. I venture to predict that if the inquiry is new to him and he pursues it persistently, honestly, and intelligently, he will find it a puzzle. Yet common sense should conclude that if the law is so ubiquitously concerned with legal rights and duties and if those terms are commonly recurrent in technical speech, no one can pretend to mastery of any

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expressions in those sequences. I include official judicial generalizations in their concrete entirety and not merely 'their content,' whatever meaning Mr. Spencer may give to that phrase. These generalizations are mental processes, it is true, but they are external to the mind of the legal investigator and are therefore objective to his thought. They are a most important part of the mental operations through which the judges as governmental agents determine the subsequent legal effects of the 'case,' but although the expression of these generalizations must be carefully studied in order that their own causative force and that of abstracted facts in the preceding events of the case may be appreciated properly, they are not necessarily accurate comprehensions of the efficient causative elements in the 'case' nor authoritative trustworthy guides to prognostications of future decisions within their range. I will not trespass further on Mr. Spencer's space to explain this, but will refer the anxious mystified to my article for enlightenment. Necessarily I am touching rather lightly and partially only a few of the points of my theory in this cursory reply. I do not expect anyone to get from it an adequate understanding.

"Three miscellaneous statements had better be made here to obviate possible objections. First:—although the sequences of occurrences out of which a 'case' grows and through which it is carried to completion are infinite in their details, of course not all of these details are of importance to the lawyer who conducts the case nor to an observer of its history. Part of the details never come to the notice of either, and of those that do, many are discarded as immaterial by the trained intelligence. Second:—of course the governmental consequences which follow from the actual facts of 'a case' may be brought about through failure to properly conduct the case, through inability to produce admissible evidence of the facts, or through failure to convince the triers of fact of the truth. These facts are within the range of the lawyer's field of study, and, indeed, to some extent are dealt with in works and courses on evidence and procedure. Third:—the governmental consequences and processes which lawyers study and with which they deal include those brought about by other governmental agencies than the courts. For instance, a client may wish to know what will happen at the customs if he tries to import a certain commodity; or may request legal services with respect to proceedings before a commission or legislative body; but in the great majority of 'cases' which are fought to a finish, the ultimate authoritative direction of consequences is given by the judgment of a court. All actions by other governmental agencies upon his 'cases' are also of practical importance to the lawyer, however, and are within his field of legal study." 25 Green Bag, 162 at pp. 164, 166. April, 1913.

portion of the law or of its language until he realizes what he and others mean by "legal right" and "legal wrong." Let us, therefore, cheerfully make the effort to unmask the substance behind these convenient terms.

"According to law" and "against law" spring up in the mind as synonyms for "legally right" and "legally wrong," and I imagine that an orthodox legal theorist who was asked to give some further explanation might reply that anything is legally right if it complies with the rules of law and a thing is legally wrong if it does not accord with those rules. Those who endorse the views of my main article will find no difficulty in exposing the vagueness, shallowness, and uselessness of this specious definition. Its only merit is that it passes smoothly over a difficulty and helps the conventional text-writer to satisfy the conventional demand for a preliminary glossary without mental strain. Those who agree with me as to the nature of the law, will perceive easily that accordance with any rule or principle, real or imaginary, cannot be the ultimate test entitling conduct to the label "legally right." Our terms must have reference directly or indirectly to potential concrete operations of the law-determining agencies of government, consequential to the events and circumstances to which the terms are applied. Let us examine into the validity of this statement more closely, by attempting to define the partly correlative terms *legal right* and *legal duty*.

Black and White enter into a written agreement, whereby White promises to pay Black $1,000 for a certain piece of land and Black promises to convey the land to White on June 1 following. As a result of this agreement, a legal relationship arises between Black and White—that is to say, certain reciprocal legal rights and duties are "created" between the two. What is meant by this familiar statement? To what facts do those terms *legal rights* and *duties* refer? Can we point definitely to their objects? If one speaks of a certain horse named Carl, one can indicate with sufficient clearness the identity and nature of the object. Are not the specific application of legal terms as demonstrable?

We can answer these questions best by determining exactly what elements in the situation which I have outlined induce the statement of the existence of legal rights and duties. Every lawyer knows that if White pays or tenders Black $1,000 on June 1, and Black refuses to convey the land, White, by initiating a suit, properly prosecuting it, and successfully establishing these facts, normally will obtain judgment for damages entitling him to execution against Black's property. Also White has the alternative remedy of specific performance or reparation. Now let us assume that the contract

was oral, that a statute of frauds of the ordinary sort applied, and that White was never let into possession. Under these circumstances White would have no legal remedy for a failure of Black to keep his promise, except for reimbursement for any benefit Black may have received from White under the contract. Being without remedy, he is said to have no legal right against Black upon the contract and Black is under no legal duty of performance. The elements presented by the first case which are not paralleled in the second are (1) the contract was in writing complying with the statute of frauds; (2) the availability of legal remedies. Are there any other material facts concerning the first case which are not tallied by the second? I can see none. If there are none it is evident that the things which we call legal rights and duties must include as an essential one or both of these two distinguishing abstracted elements. Clearly the written contract forms no part of the legal duty or of the legal right, but is only one of the facts giving rise to the duty and the right. It follows then that the potential legal remedies must be objects of reference when it is asserted that White has legal rights on the contract against Black and that Black is under a legal obligation to White.

Do not the following statements express a reasonable working hypothesis for our further discussion of the meanings of these terms? The phrases *legal right* and *legal duty,* when they are used in a technical legal sense, always refer to the potentialities of legal remedies consequential to assumed or predicated events and conditions. That is said justifiably to be "legally right," irrespectively of its moral righteousness or unrighteousness, which would not meet with ultimate condemnation by the normal action of governmental agencies should its consequences bring such a question within the active jurisdiction of those agencies, and that is said justifiably to be legally wrong, irrespectively of its moral aspects, which would meet with such governmental condemnation under like circumstances. There is no absolute criterion of "legal right" or "legal wrong" excepting such governmental consequential action,[6] and this is an absolute and final criterion.

If the hypothesis is correct, the terms *legally right* and *legally wrong* when used technically are not similar in their significance to moral labels, but refer to actual and potential external results of certain sorts, and the correctness or incorrectness of the assertion that conduct is "legally right" or "legally wrong" may be proven by

[6] This statement and similar ones throughout the article should be modified so as to include such sanctions of preventive justice as the injunction in equity. I neglect this modification in the body of the article in the interest of terseness.

the evolution of events. It is not literally approval or condemnation by some authoritative voice[7] that concerns the lawyer, but the concrete legal results which may follow from postulated conditions and conduct.[8]

There are several common technical expressions and several common particular uses of these terms which will occur to my readers and possibly present obstacles to an acceptance of my hypothesis in spite of the logical difficulties of a disagreement. I wish to discuss some of these briefly and explain their accordance or discordance with the hypothesis.

It is evident that if my hypothesis is correct, the existence of legal rights and duties is not the cause of legal remedies, for the hypothesis is that the essence of legal rights and duties is the potentiality of legal remedies.[9] Legal remedies which actually occur may result exclusively from facts which include none to which the terms *right* and *duty* can be attached. For instance in the case of *White* v. *Black* which we considered above, the facts potentially causative of legal remedies did not include anything that could be called a legal right or a legal duty. They "raised" a legal right and a legal duty upon the written contract, but we found that the essence of the right and duty were the potential legal remedies that might result from conduct or events which, because of the availability of these remedies, would be called a "breach of legal duty and right." Whenever legal remedies result, they verify *pro tanto* a prediction that certain legal rights and duties existed and are not the result of them.

[7] Please take this literally. We may speak of the effects of legal proceedings as "the voice of the law" or "the approval" or "condemnation of the law," but these are figurative expressions. When the official opinions of judges are called "the voice of the law," there is uttered a theatrical and inaccurate metaphor which tends to produce and perpetuate a mental muddle.

[8] There is another sense in which the phrases **legally right** and **legally wrong** may be used,—a sense similar to that in which **right** and **wrong** are used in any art with reference to proposed or accomplished means. A certain course of action or conduct may be labeled "legally right" or "legally wrong" with reference to its efficacy or inefficacy for accomplishing certain desired legal results. A method may be condemned as "legally wrong" in this sense, although it does not subject anyone to legal liability; or it may be termed "legally right" in this sense although it does result in legal liability. For instance, an oral statement of transfer is not the "legally right" way to transfer land in fee simple. It is legally inefficacious; but it is also not a legal wrong. On the other hand, if one wishes to test his claim against A that he has "the right" to tear down a wall which according to A is subject to a party wall easement, a "legally right" way in the sense of a legally efficacious way, is to start tearing down the wall; but if it turns out that A's contention is correct, the result is legal liability for interference with the easement or (in equity) for a threatened interference. This use of the terms is not common, however, because ordinarily **right** and **wrong** without the qualifier **legal** would be used in these senses; and after it is understood, it is of no further importance to our inquiry.

[9] Compare:—"By the obligation of a contract is meant the means which at the time of its creation, the law affords for its enforcement." Mr. Justice Field, in Nelson v. St. Martin's Parish, 111 U. S. 716, 720.

They, as consequences of causal acts or omissions of the obligor, are the very meat and bone of legal rights and duties. But how can this dogma be reconciled with the common statements that legal remedies are afforded for breaches of legal right and duty and that legal rights may be classified into primary and secondary or into substantive and remedial? In so far as I can reconcile these statements, I can do so only by explaining their meanings as I see them.

When a lawyer is arguing for a certain legal result—for instance, that his client should have a certain sort of judgment—he may argue that his client had "a right" which has been violated, and he will cite cases and other authorities to support his assertion that the "right" existed; but if the court decides against him upon the basis of his contention, and if this judgment stands, it is evident that *pro tanto* the legal right did not "exist" as claimed. If the remedy had been adjudged, the right would have "existed"; but the denial of the remedy is the refusal *pro tanto* of the substance of the right and duty. If the lawyer still insists that the right and duty existed and were violated and that the court made a mistake, he means only that the court's decision was not sound. He cannot point to anything formerly or at present in existence which will correspond to his assertion of a broken right and duty. There are the facts of his case, the procedure and decision, his argument, pertinent precedents and other authorities, and the opinions of himself and others as to what sort of judgment should have been given. None of these constitute or include the asserted legal right and duty. Where and what was it? His assertion is only that something should have been which was not. It is a strong argumentative assertion of a judicial mistake and nothing more.[10]

[10] Sometimes a decision of a court,—even a decision beyond appeal,—is said to be "contrary to law" or "against legal right." Such a statement does not run counter to my analysis of the law or of the nature of legal rights and duties. It means that the decision is not in accord with the authorities which should have been given weight in the judgment,—i. e., that it is not in accord with the established course of decision on similar or analogous points, or is not in accord with results of approved lines of legal reasoning, or is not in accord with the approved interpretation of applicable legislative expression. Certainly insofar as the judgment is final on the questions litigated, it settles the law of the case and the legal rights involved. Therefore the criticism amounts only to a condemnation of the decision as erroneous in the light of the criteria of the art of the administration of justice.

In this connection it may be useful to reiterate the importance of distinguishing between the law, science or knowledge of the law, and the arts of the administration of justice and of legislation. (See 11 Mich. Law Rev., p. 9, note 11; pp. 14-15, note 16; pp. 19-20, note 21.) We may criticise the judicial results of particular litigation or the particular effects of legislation on judicial decisions. This criticism may be adverse to the skill, knowledge, and wisdom displayed by the judges or by the draftsmen and legislators. Or it merely may disapprove of the concrete results as undesirable. Nevertheless the operation of a court on litigation within its jurisdiction **pro tanto** settles the law beyond question; **pro tanto** it is a part of the law itself.

But suppose that judgment is rendered in favor of the plaintiff—let us say in an action for trespass on land. In such a case, does not the judgment result from the pre-existence of a legal duty and the breach of that duty? The lawyer for the plaintiff argued that defendant violated a duty owed to plaintiff. Undoubtedly he thought of the duty as a pre-existing thing and he cited authorities to establish its "existence." The judge in his opinion used similar language. "A landowner has a right to be free from unexcused and unjustified trespasses," he may have said. "The defendant's act falls within this description and he therefore was guilty of a legal wrong for which this action will lie." This sounds like a statement of cause and effect. How shall we explain it? We can bring it into accord with our hypothesis by carefully noticing the details of the reasoning. An extended expression of the reasoning justifying the decision would run as follows:

"From my knowledge of precedents and other authorities I know that it has been held consistently that a cause of action existed in favor of a land-possessor against one who had entered on his land without justification or excuse. Consistency with these precedents[11] and with customary and prevailing ideas demands that similar decisions be made in other cases of this sort. Therefore a generalization may be adopted as a reliable guide for judicial decisions to the effect that land-possessors have a legal right to be free from unjustifiable and unexcused trespasses on their lands. This case presents an unexcused and unjustified trespass by defendant against plaintiff. Therefore we logically conclude that defendant was guilty of a breach of legal duty and that this action lies."

In this chain of reasoning, the past authorities are not used to establish a breach of duty from which a decision of the case is deduced. They are used to establish a basis for deciding that a remedy should be given and the given remedy establishes that a breach of

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[11] In giving reasons for the potency of precedents upon judicial decisions in my main article, I omitted an obvious and very important one. With the exception of justice itself, there is no more important characteristic of a successful administration of justice than its consistency and equality. Nothing in judicial decisions will tend to raise suspicion and bring the courts into disrepute more surely with lawyers and also with laymen, when the facts become generally known, than inconsistency of one decision with another. Aside from the other practical reasons in favor of consistency which I mentioned in my main article, there operates strongly in the same direction the essential policy of maintaining the court's reputation for even-handed and firm justice.

A desire to avoid even an appearance of arbitrariness or bias has been one of the principal motives which have led judges customarily to refer their decisions to formulated abstract rules and principles and often to endorse the seductive fiction that these rules and principles have an external existence and authority independent of the particular use to which they are putting them. See 11 Mich. L. Rev. 4-5; 15-23; note 5 on p. 5.

duty and right occurred, *i. e.,* that condemnatory legal consequences could be forced on defendant at the option of plaintiff as a result of the acts, omissions, or other events constituting the "breach." The precedents are potent arguments and the generalization concerning the duty not to trespass is a convenient mental form in which are handled conclusions of what has been and should be decided in such cases. The generalization comprehends that actual breaches of legal duty have been established in similar cases in the past by the concrete remedies which actually followed those breaches; it asserts that breaches of duty occurred in similar past cases although no remedy actually followed, because of the conclusion that a remedy would have been given in each similar case had it been sought properly; and it makes a similar assertion as to future similar cases, because of a similar prediction of legal consequences in such cases if the remedy is sought properly. The "deduction" of the decision in the case before the court from the generalization is purely a mental formality.

Perhaps the judge vaguely thinks of the particular duty involved as a thing existing in the past and perhaps he gives color and form to his apprehension by imagining the sort of conduct or the abstract elements of conduct whch would have absolved defendant from liability; but I submit that such an apprehension is a delusion. The imagined conduct never existed nor did anything exist to which the term legal duty could be attached correctly. Nevertheless the defendant "was under a legal duty" in this sense, that the failure of defendant to accomplish a certain sort of results gave the plaintiff an option to bring about remedial legal consequences.

Evidently, then, a statement of the "existence" of a legal duty or right is figurative and a statement that remedies are the result of the pre-existence of duties is also figurative and positively misleading.

But what of such expressions as "It was X's duty not to trespass"? Is not "not to trespass" the expression of the substance of the duty? Ignoring the vagueness of the expression, we can agree that it indicates part of the substance of the duty, that part which is of interest to one who requires only to know what is necessary in the way of conduct to insure escape from condemnatory legal consequences. It does not express what those consequences would be, however, and therefore does not fully indicate even an outline of the duty not to trespass. The potentiality of such consequences of failure to conform to the abstract concept of conduct is connoted nevertheless by the expression, for without such connotation the described conduct would have no professional significance. We connote a window in

place when we call a piece of framework at the mill a "window frame." Without reference to its destined use, it would not be a "window frame." So when we speak of imagined conduct as "a legal duty," we connote those potentialities of legal consequences of a breach without which the conduct could not be so labeled. Let us hold fast our realistic conclusion that a predication of the existence of a legal right or duty, is only the predication that undesirable ultimate legal consequences are imminently possible at another's option if the predicated conduct or result is not realized. The predicated conduct never exists unless the duty "is performed," but the duty figuratively is said to "exist" before performance and independently of performance.[12]

What of the classification of duties and rights into primary and secondary and into substantive and remedial? The classification into primary and secondary is only a classification of the sorts of conduct or results which will prevent the sequence of a successful suit by the holder of the right into (1) that sort, the failure to observe which will make the initiation of such a suit possible (or contingently possible) for the first time and (2) that sort which will remove a previous default and prevent the legal consequences of a condemnatory suit. The classification into substantive and remedial rights is often the same; but sometimes the term remedial rights has emphatic

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[12] A **legal duty** sometimes is defined as that which a person legally is bound to accomplish and the **sanction** is spoken of as a distinct thing,—the "enforcement" or "recognition" of the duty. The "that which" of course must be a certain sort of conduct, results, or events. Conduct, results, or events considered abstractly and independently, however, do not constitute a legal duty. The connotation of the sanction is essential to the correct application of the term. Therefore, properly, we have not **legal duty and sanction** but **legal duty** including as an essential element the potentiality of the sanctioning governmental action. Furthermore, although our comprehension of these elements is abstract, general, and fragmentary, when they occur they will be concrete facts and we should prepare ourselves in any given case to analyze the duty in all its relevant details with definiteness and care, and not to be satisfied with cursory, superficial generalities.

A **legal right** sometimes is defined as an **interest recognized or protected by the law or by a rule of law**; or as a **capacity in a person to produce legal effects**; or in some similarly vague manner. The trouble with such definitions is that they do not define. They may suffice as figurative relaxations in expression for one who has clearly in mind the external facts and possibilities referred to by a technical use of our terms, but if clearness of indication is demanded, we must have answers to the questions:—What exactly is meant by **an interest**? What exactly is the nature of the **protection**? How does the ephemeral **rule of law** work its magic? What exactly is the nature of this mysterious **capacity** with which a person may be endowed by the law? What is meant by **legal effects** in this connection and how does the capacity produce them? When these questions have been answered satisfactorily, we shall see that the "definitions" are highly figurative and really are soporific and not enlightening to enquiry,—in short that as definitions they are extremely vague and useless. It is unfortunately characteristic of theoretical jurisprudence that it frequently dodges difficulties by raising new and barren ones of critical interpretation.

direct reference to the availability of remedial legal processes or their ultimate effects rather than to conduct or events which normally will bar those effects.

Now let me clarify all of this by a concrete example. James borrows $100 from Smith and promises to repay the loan without interest on May 1 following. These facts are not rights or duties; but they are said to "give rise" to a right and a duty—that is, they are titular or investitive facts. They constitute Smith's title to the legal right of payment of $100 from James on May 1 and James's correlative legal duty to pay Smith. But what facts external to the mind of the observer constitute that right and duty? Not merely the act of James's payment to Smith when it occurs nor the prospect or possibility that it will occur. The right and duty "exist" independently of performance. It is the fact that if the act of payment is not performed or tendered, Smith may sue James and normally, by properly prosecuting his action and proving his case, get judgment for damages against James and execution against his property that justifies the assertion of the "existence" of the legal right and duty. This possibility of legal condemnatory consequences as a result of a failure of James to accomplish payment is the substance of the legal right and duty. The abstract imagination of the performance or tender of the act of payment on May 1, with the threatening legal consequences of non-performance connoted, is labeled a substantive, primary, principal, or antecedent right and duty. If James fails to fulfill this primary duty, it is said that immediately the primary right and duty are broken and a secondary right and duty arises. That is to say prevention of the legal consequences of a successful suit in favor of Smith against James is no longer possible by means of a performance of James's "duty" of payment on May 1. May 1 is gone forever. There still remains, however, figuratively a legal burden on James in favor of Smith which is denominated a secondary right and duty. In reality what is this secondary right and duty? Again the essential external substance will be found to be the possibility of the same undesirable legal consequences as a result of the breach, if satisfaction of the breach is not made by the payment of the legal damages suffered by Smith. The label "secondary right and duty" has immediate reference, however, to the abstract imagination of the payment by James of the proper amount of damages to bar the retributory legal consequences, with those alternative threatening consequences connoted. The term "remedial right" might be used in the same sense, or it might be used to indicate the legal remedial procedure which is available to Smith for James's default or the ultimate remedial effect of that procedure.

In short, and by way of reiteration, the phrases "legal right" and "legal duty" are referable to facts in the external world or our mental realizations or imaginations of such facts.[13] They are used to handle and communicate abstractly, and generally with some convenient vagueness, our mental concepts and reasoning concerning the

[13] Perhaps I had better here remove an opportunity for critical distraction. There may be some who will charge me with inconsistency in first applying the terms **legal right** and **legal duty** to external phenomena and the next moment applying them to our mental apprehensions and presages of external things. Also there may be others of a philosophical bent who will go further and assert that there is no reality excepting an internal one,—that our consciousness constitutes our world; that no science has an external field; and that language necessarily always is applied only to phases of the consciousness of the user and the interpreter. A few words will suffice to satisfy our present interest in this question of metaphysics.

It is true that we realize things only through the physiological processes of consciousness and that according to strict analysis we use language with direct reference only to phases of the consciousness which dictates it. The purpose of language is the communication of consciousness and this purpose is accomplished only insofar as the mental images, symbols, and "feelings" of the user are tallied by equivalents in the mind of the interpreter as the result of his interpretation. Nevertheless, it is at best merely a verbal quibble to insist that there is no real existence of things outside of the mind. Certainly our thought and speech are largely concerned with the realization of external facts. Habitually, except when we are interested in psychology, we conceive that we think and talk about things outside of the mind rather than about our own mental reflections and projections of external things; and this custom, (to put it euphemistically), of thought and speech, which enables us blurringly to identify our settled perceptions of a work of art, or of a cow, or of a series of events, with the objects of those perceptions, and to converse with another as though each participant were thinking and speaking directly of the same external thing instead of phases of his own limited consciousness concerning that thing, makes for terseness and is a great convenience in thought and communication. Generally the blurring will not misguide thought on subjects such as ours, and therefore I have followed this common, useful, and proper, but not analytically accurate, manner of speech. When, however, the terms legal right and legal duty are referable partly or wholly to imaginations of contingent future events, such as the possible legal consequences of a failure to fulfill a duty, for instance, it is obvious that pro tanto no external things exist to which the terms can be applied. The possibilities "exist" only in a figurative sense. Therefore, to avoid the appearance of absurdity, I have in one or two places risked the appearance of inconsistency, and given alternatively the analytically correct application of our terms. The inconsistency is not real, but only apparent. It is the result of following as far as is expedient common and proper short cuts in thought and speech.

With respect to this matter of common economies and conveniences in thought, it may be useful to call attention to the fact that we use and further our knowledge of external things to a remarkable extent by means of metaphorical mental images, impressions, and symbols and that in legal discussion it is wise to be on our guard against being misled by our figurative devices or stopped by their accustomed plausibility in our legal analyses before we have comprehended the actual objects of our investigations. For instance, the feeling or vague mental knot which ties the terms "legal right" and "legal duty" to our perceptions and stored knowledge of the related objective externals, may take the symbolic form of a connecting rope, a knot, a figurative bond of any simple typical sort, tying the obligor to the obligee; but this figure only connotes the actual facts of legal obligation and right and does not photograph accurately the external essential to which those terms indirectly refer. Such mental tools of consciousness are useful, but a study of the nature of legal rights and duties should not end with noting their use; nor should their use be confused with comprehension of the externals which constitute the rights and duties.

potential causal relations between predicated events and circumstances and the legal consequences which may follow through the operation of our governmental law-determining and justice-administering machinery. We may deal with information concerning such sequences without the use of the terms "legal right" and "legal duty." For instance in our hypothetical case of *Smith* v. *James* we could describe in particular detail what sort of conduct would lay James open to liability and what would absolve him from liability, and through what sort of legal processes liability would be enforced, without once using the words "right" or "duty." When those terms are used, they serve only as convenient brief handles for abstract discussion of phases of the situation and its potential consequences.[14]

If I have been understood thus far, it should be easy to admit the truth of several correlated propositions which I shall now set forth in succession and which probably will surprise those who never have analyzed carefully their use of common legal terms. For purposes of terse consolidated statement, let me premise by repeating in terse abstract form two of my previous points.

My first proposition is that legal remedies[15] are not the result of

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[14] The use of the phrase **legal duty** in connection with one sort of cases may raise some difficulty of interpretation. I refer to cases where, without any previous relevant conduct or failure on the part of X which would meet with judicial condemnation in consequential legal proceedings, a risk of liability, which may be entirely beyond his control, is placed upon X. Instances of this sort of cases are, in some jurisdictions, cases covered by the so-called, much criticised "rule in Rylands v. Fletcher" (L. R. 1 Ex. 265; L. R. 3 H. L. 330), and, in all jurisdictions, insurance cases. Is there properly a legal primary duty in such cases, or only a contingent and not discreditable legal liability without antecedent right or duty? Unless the words **legal duty** can be used in a sense which does not imply that condemnable conduct or neglect must be involved in a breach, it is not linguistically proper to say that a primary or substantive duty and its breach are involved in these cases. If, however, we use these expressions as indicating only that legal liability of X will follow if events turn out so and so,—a burden of contingent liability arising from certain causative or "investitive" facts,—there is no serious objection to applying the terms in these cases as well as in others, and I think that there is sufficient authority in the way of past usage to support the application in this sense.

[15] By the phrase **legal remedy**, I mean to indicate the entire legal procedure through which satisfaction is obtained, including the initiation of a suit, service of process, pleadings, the trial, arguments of counsel, the reasoning of the judges, the expression of their opinions, judgment, appeal, reversal or affirmance, execution, etc., etc. However, for reasons of technical convenience, it usually is said that a new substantive legal right arises upon a judgment,—a right distinct from the one upon which the suit was brought. The reasons of convenience are that another suit may be brought upon the judgment within certain limits of time and circumstance, if the judgment is not satisfied, that the judgment itself constitutes the initiatory element of title to maintain that suit, and that the considerations which must be resorted to in determining whether successful and proper legal procedure on the judgment has been barred,—i. e., whether the right has been discharged or otherwise suspended or destroyed,—are distinct from those which were applicable to a similar question on the original cause of action and may be

the correlative legal rights and duties which, according to common phraseology, they "vindicate," or "enforce," or "sanction," but the potentiality of consequential remedies constitutes an essential element of the duties and rights.[16]

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quite different in details, and that the old cause of action is "merged." Nevertheless a complete appreciation of the original primary right for whose breach the first judgment is obtained, can not be made before the first cause of action arises without determining in detail to the practical limits of execution, etc., the legal results which may follow a breach. Therefore, I make the first statement in this note.

[16] "Where there is a perfect obligation, there is a right coupled with a remedy, i. e., an appropriate process of law by which the authority of a competent court can be set in motion to enforce the right. Where there is an imperfect obligation, there is a right without a remedy. This is an abnormal state of things, making an exception whenever it occurs to the general law expressed in the maxim: **Ubi jus ibi remedium.** And it can be produced only by the operation of some special rule of positive law. . . ." Pollock on Contracts, 641-642.

In the chapter from which this passage is quoted, Sir Frederick Pollock discusses various types of cases which involve, he asserts, imperfect legal obligations. This chapter and similar instances of use of the terms, "legal rights and duties of imperfect obligation" and "imperfect legal rights and obligations" may raise or fortify doubts of the soundness of my theory of the nature of legal rights and duties. Therefore they demand at least a brief consideration.

Can these uses of our terms be reconciled with my theory? We shall find no difficulty in justifying an affirmative answer to this question provided we keep in mind the following two points. (1) If we would understand any particular use of our terms, it is not sufficient to accept unquestioningly an abstract definition by the user, or to acquire vague impressions of the meaning intended; but we must apprehend distinctly the objective facts actually indicated by the use. (2) The terms, "legal right" and "legal duty" are used in various senses and we may find here another meaning or other meanings than the primary one which we have evolved.

A great amount of space would be required to discuss in detail the uses which are the subject of this note, but I think that a sufficient indication of the proper method of interpretation may be given in a few words to those who will read Chapter 13 of Pollock on Contracts in order to obtain a background for my remarks. See also Salmond, Jurisprudence, 2nd Edition, pp. 198 et seq. The "legal effects" which, according to the phraseology of this chapter, evidence the existence of an imperfect obligation on an agreement, are of various sorts. Some of them, such for instance as the fact that in some jurisdictions a creditor whose debt is barred by a statute of limitations can appropriate without liability money paid by the debtor on account to satisfaction of the barred debt instead of other debts unless the debtor indicates otherwise, or that an executor properly can retain out of the estate for a debt due himself which is barred by a statute of limitations, are legal liberties or "defensive rights," which exist because of the agreement and which are not barred by the terms of the statute. Similarly some of them, such as the fact that in some jurisdictions a creditor whose debt is barred by the statute of limitations, nevertheless can enforce liens on property which he holds as collateral security, are unaffected rights, powers, and liberties of action. The fact that a creditor who is barred in one jurisdiction by its statute of limitations has recovered judgment in another jurisdiction,—i. e., that the bar has been adjudged a local and procedural one,—is evidence that a right of action may exist by the law of the second jurisdiction although there is no right of action by the law of the first jurisdiction. The fact that the statute of limitations must be pleaded and specially relied upon to make it effective as a defense, is a point of procedure only which does not affect the validity of my theory. Any available defense may fail if not properly maintained. A plaintiff who has no cause of action and who had no substantive right of the sort alleged against defendant may get a judgment through defendant's default. The fact that a new promise without consideration will "revive" a cause of action on a contract after it has been barred by the statute of limitations and that "if A agrees informally with X to sell

The second proposition is that the division of legal rights and duties into primary or substantive and secondary or remedial is only a classification of conditions, conduct, events, and results in their aspect of barriers to condemnatory legal consequences.

The following propositions are corollaries.

Proposition three:—Every legal right and duty is concrete in this sense. The investitive facts are concrete events of the past and present. The conduct or results which will prevent or bar the condemnatory legal consequences will be concrete events, if they are rendered. The condemnatory consequences of a breach also will consist of concrete events. The persons in whose favor and against whom the legal remedies are contingently available are, or will be before the remedy is accomplished, concrete determinable persons. It is true that our mental perception and imagination of all these matters is more or less abstract and often is quite generalized. This is characteristic of human knowledge and reasoning.

Proposition four:—No right or duty is completely defined until there have been indicated with particularity, (1) the person or persons in whose favor the right and duty "exist"; (2) the person or persons against whom it "exists";[17] (3) the alternative events which

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land to him, and afterwards agrees in writing to sell the same land to Z, and then conveys to X in pursuance of the first agreement, Z has no equity as against X," are not evidence of the existence of legal obligations in favor of the original promisees before the occurrence of the subsequent events in their favor, but are evidences of the strong persuasive force which their cases still exercise on courts excepting where the bar of the statutes is adjudged effective. Similarly, the fact that a plaintiff who is "obligee" of an "imperfect obligation" often may recover in quasi-contract, shows that the applicable hampering statute or principle does not render absolutely void the transaction of agreement. The agreement itself, however, according to my language, does not give rise to an obligation or a right on the contract, but, together with other concurrent or subsequent facts, constitutes part of a good title to a quasi-contractual right of action.

Obviously in each sort of case mentioned by Sir Frederick Pollock, the essence of the "imperfect legal obligation" and "right" is the various legal effects on which he relies for his statement. There is nothing else tangible to which the terms might be applied colorably. Therefore, our term "legal right" and the qualifier "imperfect" are used by him in a distinguishable heterogeneous conglomerate sense and denote all of the various facts of law indicated by his discussion of each particular sort of "imperfect obligation." An abstract idea binding all these various sorts of facts together is that courts habitually uphold the case of the "imperfect obligee" except insofar as the statute or barring principle prevents a remedy.

I trust that this will show sufficiently my manner of explaining all similar uses of the terms "right," "duty," and "obligation." I do not intend it in the slightest degree as an adverse criticism of such uses. I am not concerned at present with commending or condemning any of the various uses of our terms, but only with explaining those uses, so as to prevent as far as I can the shadows which language often casts over our legal reasoning.

[17] The person in whose favor or against whom a legal right exists may be an individual, a corporation, the state, or some other collective legal entity. We need not stop now to analyze the nature of legal persons who are not individuals. It will in no

will "discharge" the duty; and (4) the alternative potential consequences of a "breach."

Proposition five:—Legal rights and duties sometimes are said to be correlative. As a matter of fact a legal right and its "correlated" legal duty are identical. The terms refer mediately to exactly the same facts, actual and imagined and potential—*i. e.,* to the same opposing persons, the same titular events, the same "demanded" conduct or results, and the same contingently available legal remedies. When we speak of the duty, however, our realization stresses the burden phase, whereas when we speak of the right, our realization stresses the benefit phase. The terms are correlative, but the indicated facts are the same.[18] Figuratively speaking, we may say that a legal right is a legal duty seen from the handle end and that a legal duty is a legal right seen from the club end.

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way affect the validity of my exposition to adopt the well established mode of speech which calls the state or a corporation **a legal person.**

Perhaps, however, a familiar dogma of some jurists that a legal duty can not be owed a state within its own jurisdiction by one of its own citizens or subjects and, conversely, that a state has no "legal rights," (i. e., "offensive" rights), against its own citizens or subjects within its own jurisdiction should be discussed briefly. For instance, John Austin classified certain sorts of legal duties as "absolute duties," because he said that they were not correlatively rights. (Austin, Jurisprudence, Lecture XVII). Among them he placed duties owed the sovereign, because:—

"To every legal right, there are three several parties: namely, a party bearing the right; a party burthened with the relative duty; and a sovereign government setting the law through which the right and the duty are respectively conferred and imposed. A sovereign government can not acquire rights through laws set by itself to its own subjects. A man is no more able to confer a right on himself, than he is able to impose on himself a law or duty. Every party bearing a right, (divine, legal, or moral), has necessarily acquired the right through the might or power of another: that is to say, through a law and a duty, (proper or improper), laid by that other party on a further and distinct party. Consequently, if a sovereign government had legal rights against its own subjects, those rights were the creatures of positive laws set to its own subjects by a third person or body...." (Austin, Jurisprudence, p. 284, Lecture VI. See also pp. 282 et seq.)

Obviously this is only a matter of definition of the term **legal right.** If my definitions of the term correspond with actual technical usage, I see no sound objection to stating that a legal right existed in favor of any person to whom the agencies of authoritative government afford remedial processes against another who has failed to fulfill his correlative duty. The state or its representative has such remedies in cases of breaches of duties constituting crimes or constituting infringements of property rights of the state. Therefore, I say that it has legal rights; and I believe that this follows common linguistic usage. (Compare 1 Bl. Com. 268; 3 id. 40; 4 id. 88.) Similarly I say that the state owes legal duties to those in whose favor its agencies offer remedial processes against the state for events which constitute "breaches" of those duties. (Compare Salmond on Jurisprudence, 2nd ed., pp. 200-202; Holland on Jurisprudence, 10th ed., pp. 126-127.) Of course any differences in the details, scope, or effectiveness of the remedy afforded against the state from those afforded against others should be noted in describing rights against the state,—for instance the common unavailability of compulsory execution against the state.

Let me repeat that I am accepting without critical analysis the common technical habit of thinking of the state as a legal unitary person.

[18] Austin noted this fact. See Austin's Jurisprudence, p. 400. (Lecture XVII.)

Several other propositions are related to those which I have stated, but they demand some further preliminary elucidation.

Rights in rem is a common legal phrase and is opposed to *Rights in personam. Rights in rem* is used, it is said, as a label to indicate rights which are good against the world in general. It is more accurate language to say that they are good against indeterminate persons. *Rights in personam* on the other hand are good against determinate or determinable persons only, or against such persons and their successors in interest. How does this common speech agree with my third proposition?

The truth is that a *right in rem* is not one right but a multitude of rights, "existing" and potential or all potential, which are apprehended or imagined together in a vague abstraction and labeled "a right." For instance, the "property right" of a particular land-possessor is classed as a *right in rem;* but a land-possessor has not merely a single right. His "right" is, figuratively, a great bundle of infinitely varied and numerous potential concrete rights. The fruition or birth of each right in this bundle will consist of certain events imminently imposing upon a certain person or certain persons a necessity to accomplish a determinate sort of conduct or events and conditions if they would escape legal liability to the "holder" of the right. For instance, if one Jones approaches the holder's boundary line, he is under the necessity of not crossing it without legal justification or excuse if he would avoid legal liability. This statement indicates partially the substance of this particular determinate duty and of its "correlated right." Similar illustrations might be given of the occurrence of a restriction or burden upon a certain person to avoid liability for a nuisance to the holder as legal possessor, or to avoid liability for an "infringement of his riparian rights," etc., etc.; and each illustration would portray partly a distinct concrete legal duty and right, whose full definition would include all the elements catalogued in my fourth proposition. All of these infinitely numerous potential concrete rights are indicated compendiously but vaguely by the phrase *the property right of a land-possessor.*

A similar but more limited statement would be true concerning the phrase *right in personam.* One will find frequently that what he terms "a right in personam," is only his abstract apprehension of a "mass" of various potential concrete rights and liberties, each "operative" against the same determinate person or persons, or their successors in interest. It is evident, therefore, that we have here a distinct use of the term "legal right" to denote a mental conglomerate of potential "legal rights" of the concrete sort which we have considered previously. This compendious use of the term and a sim-

ilar use of the correlative term "legal duty" is quite common in technical speech and rarely is distingished from the more definite and concrete application. Although its natural result is to darken and confuse an inquiry into the nature of legal rights and duties, of course usage makes both the different sorts of applications of the term linguistically proper.[19]

Proposition six:—A *right in rem* is not an actual concrete external entity, but is an infinite "mass" of actual and potential concrete rights imagined or realized vaguely and labeled by an entity term for purposes of rough classification and convenience in thinking. A similar statement often will be applicable to uses of the phrase *legal right in personam*.[20]

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[19] Not only is this very abstract and compendious use of the terms **legal right** and **legal duty** very common but it also often stretches the capacity of the terms to the limits of abstract elasticity. We commonly speak of "the right of self-defense." This phrase indicates all the actual and future concrete liberties of conduct which would be classified under it. It is a very compendious term since its limits are not confined by a specification of any particular holders of the legal liberties included or of any particu lar person against whom they are available, or of any particular sort of circumstances in which they arise. It is therefore a vague class label of a multitude of varied legal liberties and future legal liberties. The phrase "the right of a land-possessor" is even more extensive in its spread. It covers not only all the multifarious legal "offensive" rights in favor of whatever person and against whatever person, which may be grouped under this abstract label, and all similar future rights, but also an infinity of legal liberties and future legal liberties of countless variety.

Perhaps a word or two more on this point may aid in clarifying the puzzling shadows of language. I have said that such expressions as "the right to be free from harmful assaults" and "the duty to perform binding contracts" are not indicative of a single right or duty but of an infinitude of past, present, and potential concrete rights and duties. Why, then, are these commonly used labels singular instead of plural in form? Is the usage incorrect?

The usage is not incorrect. Propriety in language is determined by usage and not exclusively by logical rules. The legitimate meanings of words and phrases stretch in every direction responding to the pull of usage directed by imaginative mental figures and pictures, by instinctive correlations and combinations of associated ideas, and by mental blurrings, as well as by careful logical thinking. Men think largely in abstract ideas and they naturally tend to treat abstractions concerning different but similar external things as mental symbols of the same thing, just as they commonly think and speak of exactly similar rules or principles existing in different minds at different times as one and the same rule or principle. See 11 Mich. L. Rev., pp. 4-9. Thus the similarity between the abstract comprehensions of similar characteristics of all the concrete duties which might be grouped under the designation "the duty to perform a binding contract" tends to produce the impression of the oneness of these duties; and we have an infinite number of concrete similar duties referred to as "a legal duty" and an infinite number of similar concrete rights referred to as "a legal right."

It is evident that this is a different, though related, meaning of the words from that which they have when a specific course of conduct is ascribed to a certain person as "a legal duty." Also it should be evident that it is a meaning which could not be distinguished clearly and easily by a terse definition. Therefore I have taken a little space to explain it. The explanation is important because the use is common and rarely discriminated consciously from other related uses.

[20] The substance of the following note is a corollary to these points concerning the nature of legal duties.

A very common mode of legal argument runs in form as follows:—"Jones had a legal right (of a sort described by general specifications). Smith's acts were in violation of this right. Therefore Jones has a good cause of action." The assertion that Jones had "a legal right" of the very generally described sort is regarded as a major premise of law from which and the facts of the case (the minor premise) the conclusion follows irresistibly. If the general description of Jones's "right" is definitely indicative in expression or suggestion of the circumstances under which a cause of action will accrue to Jones, if the truth of the statement is properly established, and if the case against Smith falls within the specifications, there is no objection to the argument. Three facts should be borne in mind, however.

First, unless the description of Jones's "right" definitely indicates the various circumstances under which liability to Jones might arise and the nature of those liabilities as far as relevant, it is not a satisfactory major premise. These matters need not be expressed fully. It suffices that the expression induces memory of the required facts. The description of the "right" is, of course, a generalized description of a multitude of actual and potential concrete rights, and fails as such in proportion as it fails in definiteness and clearness. For instance, an assertion that a person has a legal right to be free from harm intentionally inflicted without legal justification or excuse does not tend to establish in the slightest degree that Jones has a particular cause of action for harm which Smith has caused him intentionally. The statement, taken in its unobjectionable sense as a prologue to a partial summary of legal liability is a truism; but it leaves wholly unclarified the limits of legal liability because it fails to indicate in what cases defendant will be excused or justified in spite of the intentional harm he has caused. It has not even the degree of definiteness that attaches to a general rule subject only to special unmentioned exceptions. No learned lawyer would maintain that the abstract fact that Smith has intentionally caused harm to Jones, taken by itself, would raise either a natural or a legal presumption that Smith violated a legal duty owed Jones. The cases in which harm has been caused another intentionally without either legal or moral blame are too numerous and varied to permit of a presumption that a legal wrong has been committed against Jones or of a conclusion that consequential legal liability is the general rule; although the fact that certain concrete harm has been intentionally caused by defendant is undoubtedly in many cases a strong consideration against him. As a prologue, the statement has merit in that it tends to free the mind of a pedantic, archaic bias that would limit recovery to the narrow analogies of stereotyped precedent, and thus broadens and clarifies the vision at the outset of enquiry; but it merely postpones the solution of the problem which induces it. In determining Jones's liability, we can derive no further help from this indefinite proposition, but must depend upon discovering and balancing the arguments which would determine the outcome of litigation.

Second:—Whether or not Jones had "a right" of the specified sort is immaterial except insofar as it included the contingent availability of the legal remedy in dispute, and the availability of this remedy can be established only by establishing that the courts will give him judgment if he seeks it properly. Therefore, the general statement of Jones's "right" must include or imply an assertion that he has the right of action in dispute or it is not a satisfactory major premise.

Third:—Unless, however, the assertion that the right of action exists is supported by proof, the question is begged. How is the proof to be accomplished? Conclusively by the outcome of litigation. Predictively by discovering, analyzing, and appreciating precedents and other considerations which would weigh with the courts and by balancing probabilities. The major premise concerning Jones's "right" may be supported entirely, or insofar as it is material, by such investigation and reasoning of the one who utters it or of someone else whose report is accepted; or its general form may serve to awaken common professional knowledge of its truth. In any of these ways the requirement of proof may be met and the syllogism relieved from the appearance of a dogmatic assertion.

In short, the syllogistic form of summing up a defendant's liability is no part of the analytical investigation and reasoning establishing that liability. Although it is sometimes useful in putting memory and reason in order, it is not necessary to legal

Another related but distinct meaning of the term *legal right* attaches to it in such a phrase as *legal right of action.* This use denotes only the fact that the "holder" of the right could maintain a suit upon the basis of a connoted accrued "cause of action." Obviously this use differs from those discussed previously, although in referring to the outcome of potential litigation or other legal processes it has a partial similarity of meaning.[21]

There remain three other technical uses of the words *legal right*

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reasoning or to reasoning in other fields. That Smith is liable or is not liable to Jones may be proven by analysis of the facts and of precedents and other authorities without resort to syllogistic parade. Indeed the enforced or habitual use of the syllogism in arguments concerning legal liability has a vicious natural tendency to induce a superstition that the major premise asserts the existence of an independent pre-existing entity,—a "right" whose violation is the cause of particular legal liability, and also the more general fallacy that a sound major premise is part of "the law," (i. e., a system of rules and principles), which mysteriously is responsible for and justifies judicial action.

[21] Perhaps a subconscious confusion of this meaning of the term legal right, (i. e., right of action), and the meaning first indicated by me accounts partially for the frequency with which a rather trivial question is discussed at length and with insistence. In many cases, of course, damage is an essential element of a cause of action, i. e., an essential element in a title to a right of action. The question to which I refer is whether in such cases it is correct to say that the substantive duty involved was "broken" before the damage occurred. For instance, Dennis drives his automobile close to Piper's horse and sounds his horn unnecessarily and carelessly, thereby frightening the horse. If the horse bolts and causes "proximate" damage to Piper, there is a cause of action; if no damage follows, there is no cause of action. When the horn is blown, the results are in the future and the cause of action is not yet matured or negatived. Has a breach of legal duty occurred?

If we stop a moment to think, it becomes clear that the problem involved in this question is a linguistic one only. There is no doubt concerning the facts, nor concerning the circumstances under which Dennis will become liable to Piper,—in short no question of fact or of law. The inquiry put is to be answered only by defining what is meant by "a breach of duty." It therefore is one of linguistic import only. If we choose to apply the term **breach of duty** only when a cause of action has accrued, Dennis has broken no legal duty owed Piper. Such a limited use of the term is supported by the argument of some legal technicians. On the other hand, if we mean by "breach of duty" such conduct, results, or events as raise either an accrued legal liability, or a **contingent legal liability** for whatever "proximate" damages may follow, Dennis has broken a legal duty owed Piper, although a cause of action has not yet accrued. Certainly his conduct was legally condemnable,—i. e., it would be considered by a court sufficient to subject him to liability for any consequential damages within the limits of legal liability. Indeed, somewhat similar cases might be imagined in which an injunction against dangerous threatened conduct might be issued on the ground that it would be legally condemnable and that there would be no adequate remedy at law for the probable damaging consequences. Therefore, I do not see any good reason against labeling Dennis's conduct a breach of legal duty in this sense, and I think that such a use of the term would be in accord with the prevalent usage of judges and practicing attorneys and of many text writers. However, some theorists object to this use with an insistence which implies a belief that the point is an important one of substance. This it certainly is not, for to escape the objection one need only substitute another expression to carry the same intended meaning that the conduct, results, or events labeled would be held by the court to throw on the obligor liability for consequential legally "proximate" damages.

to which I would call attention. If X gives to Y an oral permission to cross his land, Y, while the license is unrevoked, is said to have "a right" to cross X's land. If we examine in detail the potentialities of causal events and legal consequences to which this labeling phrase thus is applied, we find that an interference by X or by anyone else with Y's passage without a legal wrong in respect to Y's personal security, affords no cause of action in favor of Y. If a personal assault is made on Y, or if his person is injured by the method of interference adopted, legal liability to Y may ensue; but abstractly the fact that Y's passage is prevented does not cause liability. The effect of the license is merely to afford Y exemption from liability to X for trespassing on his land.[22] It is an element which will prevent a concrete passage over the land by Y from causing a normal series of legal condemnatory events at the option of X. Between *rights* of this sort, whose essence is the holder's freedom from legal liability within their limitations, and concrete *rights* of the sort first discussed, whose essence is the contingent liability of others in favor of the holder, there is an obvious distinction which frequently is blurred in the mind. The blurring is intensified and perhaps caused by the fact that the same word is used to designate these two dissimilar sorts of things. For convenience we may call *rights* of the sort which we first discussed *offensive rights,* and *rights* of this last sort *defensive rights* or *liberties.* We may indicate tersely the distinction between the two sorts by the statement that *offensive rights* are correlatively duties owed the holder whereas *defensive rights* are essentially the absence of pertinent

[22] See Reeves, Real Property, § 235; Tiffany, Real Property, § 304.

[23] The substantial distinction between freedom from legal liability consequential to predicated conduct, and the availability of legal remedies as a consequence of another's breach of a legal duty is obvious and is at once noted by every careful student of law. The fact that the same word "rights" commonly is used with reference to each of these two different sorts of things also has been noted many times by text writers, jurists, and teachers. Often, however, it has been ignored. On the other hand, sometimes we meet in this connection that strange bias of mind which insists upon magnifying a finical discrimination in the manipulation of language into a matter of great moment and a prerequisite to a proper understanding of the law. For instance, one may be charged with serious error in following the common usage which applies to the phrase **legal right** both of the two senses that I have distinguished, and gravely told that it makes all the difference in the world whether what I call a **legal defensive right** is labeled a **right** or a **legal liberty.** It is important that differences in external facts within our range of study be appreciated, but language accomplishes its purpose if it conveys information efficiently. It seems obvious to me that much more is gained by explaining common usage than by stigmatizing common usage as erroneous because it does not conform to a personal vocabulary, however carefully and logically that vocabulary has been devised. When the critic goes so far in his linguistic zeal as to confuse substance and language and to overemphasize language, his efforts become not merely uneconomical, but distinctly pernicious. We cannot condemn too heartily that sort of legal pseudo-analysis which

legal duties burdening the holder in favor of others.[23] Abstractly the term *legal defensive right* has a similar denotation to that of the term *legal offensive right* insofar as it refers to the fact that pertinent potential governmental results of the predicated events will be favorable to the holder of the right.

Just as *offensive* rights are concrete, so *defensive* rights or liberties are concrete. Similarly also, a legal liberty is never defined completely until its elements are defined in concrete particularity and detail. Also we commonly use the terms *legal liberty* and *legal right* (in the sense of *legal defensive right*) to indicate, not a single concrete liberty, but a multitude of similar legal liberties apprehended or imagined compendiously as a unit, and we may use the phrases *legal liberty in rem* and *legal liberty in personam* with meanings analagous to those indicated by the phrases *in rem* and *in personam* in connection with the phrase *legal rights* used in the sense of *offensive rights*. Furthermore "offensive" rights and "defensive" rights or liberties commonly are associated mentally in those large "bundles" of concrete legal rights which usually are designated by entity names, such as "the land-possessor's right of possession," "X's riparian right," "Z's right of personal liberty." That is to say X's "riparian right" includes legal liberties to use the water (freedom from legal liability for a proper use) and also "offensive rights," essentially consisting in the potential liabilities of others to him for "violations" of these offensive rights.

Another distinct use of the term legal right appears in such an expression as "the right to convey." If we consider this expression in a concrete application as, for instance, "Jones has good right to convey his land X in fee simple to Henry," we shall find that it means only that a proper instrument of conveyance will "create" in favor of Henry a mass of legal rights and liberties similar to those which Jones had before the "conveyance" and will result in an extinguishment, partial or total, of the legal rights and liberties of Jones in the land. The "right to convey" is a power to accomplish legal effects by a conveyance. Its essence is this, and not freedom from legal liability; nor is it the "handle end" of a legal duty. Therefore this is quite a distinct meaning of the phrase *legal right*. With a similar denotation, it is often, in fact usually, employed in an abstract and general sense to indicate the power to make any of an indefinite number of possible "conveyances" instead of referring only to a particular concrete conveyance.

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results in a futile alleged science that might be denominated "verbal jurisprudence,"—a "science" which insists on a rigid set of artificial definitions of words as the fundamental essential.

Finally, another sort of signification of the term "legal right" may be noted in such an expression as "X's heir has the legal right of succession to the estate of the deceased." This does not mean directly and simply that X's heir now has the handle to a certain freedom from legal liability, nor that he has a particular right of action, nor that he has the power of "conveying" certain property rights. It means that the heir, through the death of X, has become entitled to succeed to X's estate—*i. e.*, it means indirectly that he has or in due time will become invested with legal rights and liberties protecting his enjoyment of the succession, but more particularly that his title to get or hold these rights and liberties would be maintained as good against adverse claims in litigation. Thus this use of the term *legal right* is fringed with the first two meanings which we have considered because the subject matter of which the "right" is predicated is itself a bundle of rights and liberties, but it also denotes more directly and particularly the fact that the net result of litigation and other judicial proceedings would establish X's heir in the possession of these rights and liberties. In this connection, then, and in other similar uses, the term in its principal significance is practically equivalent to "the best title."

In conclusion—I do not offer this brief supplementary note as a full exposition of the meanings which the phrases considered may bear in technical legal communication. I have attempted to explain the most important technical meanings common in scientific discussions of legal topics. I have not attempted to reconcile or criticise previous definitions nor to discuss the limited uses of particular authors. All word-definition purports to explain the actual usage of words or to propose certain uses. To be reliable, the explanation of word usage must be based on a careful examination and consideration of that usage. It should be remembered, however, that abstract definition by a user is not always a true or reliable indication of his use. Words commonly are used instinctively without analysis of ideas and therefore without full comprehension of the identity and actual nature of the things denoted and connoted. The analysis of ideas and the determination of the identity and nature of the objects of technical thought and speech on complicated matters is a work that requires close attention, thought, discrimination, and patience, and ordinarily does not interest even an intelligent and trained lawyer sufficiently to insure the use of these requisites and a reliable result. Therefore my purpose has been to expose the external facts to which our terms relate in common usage by analysis independently of previous formal abstract definition. I trust that I have succeeded in convincing at least some of my readers

that this note is a demonstration of actual technical usage, and not an argument for a preferred set of definitions.[24]

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[24] It may be of use to reiterate my reasons for discussing these tedious questions of superficial legal psychology. I have not been attracted to them by a fondness for observing and indicating meticulous details of mental habits and of the use of language. I have encountered these questions in the path of my professional studies and have had to answer them that I might clarify my vision and gain confidence and efficiency in mastering the particular problems which, as lawyer and teacher, I meet daily. My observation of the thinking of my students and others and the study which produced my solution have convinced me that many lawyers and law students are greatly handicapped by the lack of an exact comprehension of the nature of the law and of the correlation of its different elements. A greater handicap, quite common among students (even those who are college graduates), is a woeful lack of elementary knowledge of the processes of thought and of the limited functions of language, which condemns all but those endowed naturally with superior intelligence and initiative or obstinate determination, to stumbling in leading strings through their courses in law. It should be obvious that since lawyers continually must solve problems requiring independent, analytical thought and careful, clear expression, and since their problems are complicated by the thought and expressions of other men and bodies of men, a full mastery of the profession can not be claimed by one who has not at least a sound elementary and practical understanding of the processes of thought, the uses of language, and the interplay of the two.

Let me put this point a little differently. Our profession is not peculiar in that it will satisfy a great capacity for analytical reasoning, but the nature of the field in which it operates invites an intense, persistent, and searching scrutiny of reasoning, of motives, and of the elements of thought and speech in actual operation which is equalled by no other profession of the business world. Particularly, if we are to avoid doubtful, vague, and inaccurate thinking on legal problems, it is necessary that we perceive with clearness and precision the purport of our mental concepts and the particular application of our technical terms. Habits of thought which will permit of the care, discrimination, and patience requisite to attain these results are not common in the profession; but they must become familiar before the law will stand on an equal footing with modern medicine as the field of a learned and progressive science.

I have written the article to which this one is a supplementary note in the hope that it will suggest lines of thought which will bring beneficial results to some of my readers similar to those brought to me through my studies and that perhaps it will aid a step towards making the law the field of an accurate science. My main theme has been that the law,—i. e., the thing which is the object of our professional knowledge,—is not a set of rules and principles; that not even the common law should be studied as is a dead language; that the law is an external field of concrete phenomena; that it should be studied with such intense and careful attention as is devoted to other fields of scientific investigation; and that the rules and principles which may be endorsed as part of a science of law are not authoritative promulgations, but are mental generalizations evolved in a manner similar to those of any science. I have attempted to clarify this theme by indicating briefly the interrelations of some of the principal sorts of elements operating in the concrete field of law and by explaining, criticising and reconciling with my theory various modes of thought and speech current in the profession. The words **right** and **duty** are so frequent in legal discussion that there would be a noticeable gap in my article, fragmentary though it is, unless I gave some account of the nature of the things denoted by these terms. Hence this supplementary note.